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## Family Law - Survey of Illinois Law for the Year 1945-1946

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had lost the advantage of his prior service, could not be sentenced *nunc pro tunc*, and could obtain relief, if at all, only through the offices of the Division of Correction.<sup>37</sup>

There is intimation in the case of *United States ex rel Mazy v. Ragen*<sup>38</sup> that there is no necessity to impanel a jury to ascertain whether a convicted person has been restored to sanity, he having been previously found to be insane, before proceeding with sentence. As the writ of habeas corpus there sought was denied for failure to exhaust state remedies, the statement may be regarded as dictum. The imputation, however, would seem to conflict with the holding of the Illinois Supreme Court in *People v. Scott*<sup>39</sup> where it was indicated that, in the absence of specific provision in the statute,<sup>40</sup> jury trial on the question of restoration to sanity was a necessary corollary to trial by jury to determine insanity in the first instance.

## V. FAMILY LAW

Since the legislature first acted in 1861, the emancipation of the married woman has gone steadily forward until today she occupies virtually the same position as a *feme sole*. Some restrictions, however, still remain to hamper her freedom. One of these, as pointed out by the case of *People ex rel. Rago v. Lipsky*,<sup>1</sup> is that a married woman cannot continue to use her maiden name for purposes of voting after marriage but, upon marriage, must register anew under her husband's name in order to retain her right to vote. The Appellate Court found the provisions of the Election Code in this respect to be mandatory and not discretionary in character.<sup>2</sup> It has generally been assumed that one could change a

<sup>37</sup> The court distinguished the case of *Jackson v. Commonwealth*, 187 Ky. 760, 220 S. W. 1045 (1920), on the ground that the sentence there concerned was not imposed under an unconstitutional statute nor was it an indeterminate one.

<sup>38</sup> 149 F. (2d) 948 (1945), reversing 55 F. Supp. 143 (1944).

<sup>39</sup> 326 Ill. 327, 157 N. E. 247 (1927).

<sup>40</sup> Ill. Rev. Stat. 1945, Ch. 38, § 593.

<sup>1</sup> 327 Ill. App. 63, 63 N. E. (2d) 642 (1945), cause transferred 390 Ill. 70, 60 N. E. (2d) 422 (1945).

<sup>2</sup> Ill. Rev. Stat. 1945, Ch. 46, § 6—54.

name at will, without seeking the approbation of a court,<sup>3</sup> or continue to use a maiden name even though married, but under the ruling in the instant case this assumption no longer holds good for all purposes.<sup>4</sup> Whether or not the public interest is benefited by such a ruling is doubtful.<sup>5</sup>

The subject of divorce and matters incident thereto, as usual, make up the bulk of the cases involving aspects of family law. One issue, in this connection, concerned the power of the trial court, after the term had passed, to modify an alimony decree calling for alimony in gross. About five months after the decree had been handed down in *Recklein v. Recklein*,<sup>6</sup> providing for a conveyance to the plaintiff of the defendant's interest in certain realty in lieu of any and all alimony, the defendant petitioned the court to modify the same, stating that prior to the divorce proceedings the parties had entered into an agreement touching the real estate covered by the decree, which agreement differed from the terms of the decree. The lower court granted the modification requested but, on appeal, the Appellate Court reversed, holding that an alimony decree of this nature was the same as one for the award of a sum of money in gross for and in lieu of alimony and, once the term of court in which the decree was granted had passed, such decree had become final.<sup>7</sup>

The principle that a court has no power to render a valid personal decree calling for the payment of alimony where the defendant is outside the jurisdiction and has been served only by publication is well-known.<sup>8</sup> But constructive service of process against a non-resident defendant in an in rem proceeding against or involv-

<sup>3</sup> In *Reinken v. Reinken*, 351 Ill. 409, 184 N. E. 639 (1933), the court ruled that one could change his name without proceeding under Ill. Rev. Stat. 1945, Ch. 96, §§ 1-3.

<sup>4</sup> Rule 59A of the Illinois Supreme Court, Smith-Hurd Ill. Ann. Stat., Ch. 110, § 259.59A, adopted March 19, 1946, now forbids the changing of name on the Roll of Attorneys except in case of change of name by marriage.

<sup>5</sup> See a rather humorous comment on the subject of change of name in 27 Chicago B. Rec. 221.

<sup>6</sup> 327 Ill. App. 641, 64 N. E. (2d) 787 (1946).

<sup>7</sup> The finality of alimony decrees, where sums of money in gross are involved, had previously been recognized in *Smith v. Smith*, 334 Ill. 370, 166 N. E. 85 (1929), *Maginnis v. Maginnis*, 323 Ill. 113, 153 N. E. 654 (1926), and *Cole v. Cole*, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56 (1892).

<sup>8</sup> *Kelley v. Kelley*, 317 Ill. 104, 147 N. E. 659 (1925).

ing specific property of the defendant located within the jurisdiction is valid and empowers the court to render a binding judgment or decree as to such property.<sup>9</sup> The decision in the case of *Mowrey v. Mowrey*,<sup>10</sup> by combining these principles, has seemingly opened a new avenue to insure the collection of alimony from a non-resident defendant in holding that the defendant-husband there involved had such a property right in his position and the wages accruing therefrom as to make such property the subject of sequestration. The Appellate Court there affirmed an order, entered upon the employer located within the jurisdiction and joined as a party defendant, directing that it withhold payment of a portion of the wages due and to become due to the non-resident defendant, then accumulate the same, and eventually pay over such fund to the plaintiff for support of her minor children and her attorney's fees. The fact that the order was in the alternative, operating on the employer only in the event of a failure on the part of the husband to pay the stated sum within a specific period, did not apparently deprive it of its character as an order in rem. Where the property proceeded against is *in esse* and is located within the jurisdiction, the right to sequester is recognized,<sup>11</sup> but whether the doctrine can be validly applied to wages yet to be earned and to become due, on the theory that the employee has a property right in his job and its avails which can be seized by a court of equity, is a matter of some doubt. A court of equity, by sequestration, would seem to be able to do no more than could be accomplished by garnishment, attachment or execution.<sup>12</sup>

The scope of the inquiry when a court is petitioned by either party to a divorce decree for a modification of the alimony provisions has been the subject of much discussion. The case of *Jacobs v. Jacobs*<sup>13</sup> now indicates that a change in the financial status of the parties produced by recent amendments to the federal income

<sup>9</sup> *Martin v. Schillo*, 389 Ill. 607, 60 N. E. (2d) 392 (1945); *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725 (1909). See also Ill. Rev. Stat. 1945, Ch. 11, § 1, and Ch. 22, § 42.

<sup>10</sup> 328 Ill. App. 92, 65 N. E. (2d) 234 (1946), noted in 24 CHICAGO-KENT LAW REVIEW 350. Friend, P.J., dissented.

<sup>11</sup> *Wightman v. Wightman*, 45 Ill. 167 (1867).

<sup>12</sup> See discussion in 24 CHICAGO-KENT LAW REVIEW 350, particularly p. 354.

<sup>13</sup> 328 Ill. App. 133, 65 N. E. (2d) 588 (1946).

tax laws may be urged as a valid ground for alimony modification. When reversing the holding of the trial court which had denied modification, the Appellate Court took the view that the court rendering an alimony decree must have had in mind the net balance which would remain in the hands of the alimony recipient after tax payments. It therefore felt that any subsequent change in the income tax laws measurably affecting this net amount should be offset, as far as equitably possible, by an increase in the amount called for by the decree. That view appears reasonable in the light of prior cases defining the circumstances under which alimony provisions may be properly modified.<sup>14</sup>

The question of the validity of a Nevada divorce was presented once again to the Illinois Supreme Court in *Atkins v. Atkins*.<sup>15</sup> The court reaffirmed its previously announced position<sup>16</sup> despite an order of the Supreme Court of the United States which had vacated the judgment and remanded the case for further consideration of the problem<sup>17</sup> in the light of the recent decisions of the higher court, particularly that announced in *Esenwein v. Commonwealth of Pennsylvania*.<sup>18</sup> The Illinois Supreme Court, upholding its prior decision denying recognition to the Nevada divorce, pointed out that proof of an immediate change of domicile from the jurisdiction where the decree was granted was not "the only means by which bad faith in the establishment of the domicile in such state may be shown."<sup>19</sup> Although the appellant now came armed with affidavits to support his contention of good faith in the establishment of the Nevada domicile, the court held that it was obliged to confine itself to the evidence incorporated into the record made in the trial court.<sup>20</sup> That evidence, in the opinion of

<sup>14</sup> *Felton v. Felton*, 326 Ill. App. 444, 62 N. E. (2d) 39 (1945); *McVeigh v. McConnell*, 313 Ill. App. 75, 38 N. E. (2d) 962 (1942).

<sup>15</sup> 393 Ill. 202, 65 N. E. (2d) 801 (1946).

<sup>16</sup> *Atkins v. Atkins*, 386 Ill. 345, 54 N. E. (2d) 488 (1944).

<sup>17</sup> *Atkins v. Atkins*, — U. S. —, 66 S. Ct. 20, 90 L. Ed. (adv.) 29 (1945).

<sup>18</sup> 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608 (1945).

<sup>19</sup> 393 Ill. 202 at 210, 65 N. E. (2d) 801 at 805.

<sup>20</sup> While Ill. Rev. Stat. 1945, Ch. 110, § 216, purports to permit the reviewing court, in its discretion, to permit the taking of further testimony, the case of *Schmidt v. Equitable Life Assurance Society*, 376 Ill. 183, 33 N. E. (2d) 485 (1941), indicates that such practice is unconstitutional as an attempt to enlarge the original jurisdiction of the appellate tribunals.

the court, failed to establish good faith on appellant's part in acquiring a Nevada domicile, so the courts of that state lacked jurisdiction, thereby depriving the decree of any foundation to compel its recognition elsewhere under the full faith and credit clause.

Judging by the widespread nature of the discussion which they evoked, the two most significant cases which arose during the period of this survey were the companion cases entitled *Daily v. Parker*. One of them was an action brought on behalf of the Daily children for enticing away their father and so depriving them of his comfort, society and support.<sup>21</sup> The other was an action by the wife for alienation of affections.<sup>22</sup> In the former, the Circuit Court of Appeals for the Seventh Circuit ruled that an action may be maintained by a minor child against one who has, by enticement, taken from the child the comfort, society and support of its father thereby creating what clearly seems to be a new cause of action. No case asserting the existence of such a right has ever been presented to an Illinois court, but the absence of precedent was not regarded as enough to indicate that no such right existed. Purporting to find support for its position in the Illinois Constitution itself,<sup>23</sup> the court said that, in the absence of an express denial of a right of action in the decisions of the state court, the federal court was "free to take the course which sound judgment demands."<sup>24</sup>

In the wife's case, dismissal of the action was sought on the ground that it was prohibited by statute.<sup>25</sup> The United States District Court, pointing out that the Illinois legislature had not abolished the action but had merely made the maintenance of suits

<sup>21</sup> 152 F. (2d) 174 (1945). Jurisdiction in the federal court rested on diversity of citizenship. As the case was settled after announcement of the decision, no further review will occur. The case has been discussed in 26 Bost. L. Rev. 402, 46 Col. L. Rev. 464, 15 Ford. L. Rev. 126, 59 Harv. L. Rev. 297, 30 Minn. L. Rev. 310, 21 Notre Dame Law. 374, 94 U. of Pa. L. Rev. 437, 13 U. of Chi. L. Rev. 375, 19 So. Cal. L. Rev. 455, 20 Temple L. Q. 146, and 32 Va. L. Rev. 420. A further note is appended herein, post p. —.

<sup>22</sup> 61 F. Supp. 701 (1945), noted in 34 Ill. B. J. 397, 14 Kas. City L. J. 59, 13 U. of Chi. L. Rev. 375.

<sup>23</sup> Ill. Const. 1870, Art. II, § 19.

<sup>24</sup> 152 F. (2d) 174 at 177.

<sup>25</sup> Ill. Rev. Stat. 1945, Ch. 38, §§ 246.1 and 246.2.

thereon unlawful, held that the remaining sections of the so-called "Heart Balm" act<sup>26</sup> were unconstitutional and constituted no bar to the maintenance of an action for alienation of affections. Reliance was again placed on the same constitutional provision.<sup>27</sup> Subsequent thereto, although not technically within the period of this survey, the Illinois Supreme Court, in *Heck v. Schupp*,<sup>28</sup> came to the same conclusion on the same statute and for much the same reasons. The bar may look for a flood of litigation of this character if current newspaper reports are any indication of what lies ahead.

## VI. PROPERTY

### REAL AND PERSONAL PROPERTY

While nothing more of consequence has been said with respect to the creation or operation of future interests in land, some decisions affecting other aspects of the real property law are worthy of note. Defeasible estates in fee simple are not common, but where they are found it is important to catalog them carefully with respect to whether the defeasible estate is one upon a conditional limitation, sometimes called a fee simple determinable, or is an estate upon a condition subsequent. That fact is emphasized by the decision in *Storke v. Penn Mutual Life Insurance Company*<sup>1</sup> where an attempt was made to secure partition of a parcel of real estate based on the claim that a deed made some sixty years ago, affecting a sizeable area of valuable land in Chicago, had conveyed only a fee simple determinable estate which had automatically reverted to the heirs of the grantors upon breach of a covenant against the sale of intoxicating liquor. While the deed itself recited that in case of breach "said premises shall immediately revert to the grantors," the court found that the covenant therein operated merely as a condition subsequent, that no right

<sup>26</sup> The case of *People v. Mahumed*, 381 Ill. 81, 44 N. E. (2d) 911 (1942), had declared Ill. Rev. Stat. 1945, Ch. 38, §§ 246.3 and 246.5, unconstitutional.

<sup>27</sup> Ill. Const. 1870, Art. II, § 19.

<sup>28</sup> 394 Ill. 296, 68 N. E. (2d) 464 (1946).

<sup>1</sup> 390 Ill. 619, 61 N. E. (2d) 552 (1945).